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No. 95-113

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM G. MAHONEY & ROY S. DELON,
Petitioners,

v.

RFE/RL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the first decision by a court of appeals interpreting a 1984 amendment to the Age Discrimination in Employment Act, in which the court of appeals held that respondent was compelled by the law of Germany to dismiss its employees in Germany when those employees reached the age of 65, consistent with the decisions of the German Labor Court that it would be illegal to continue to employ those employees past the age of 65.

STATEMENT REQUIRED BY RULE 29.1

Respondent RFE/RL, Inc. has no parent company and no non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION

Respondent RFE/RL, Inc. ("RFE/RL") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit.

COUNTERSTATEMENT

RFE/RL is a Delaware non-profit corporation best known by the names of the broadcast services it operates, Radio Free Europe and Radio Liberty. Pet. App. A2.[1]

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari, and "J.A." refers to the Joint Appendix filed in the court of appeals.

At the time of the events at issue in this litigation, it employed more than 300 United States citizens among the more than 1300 employees that worked at its main European facility in Munich, Germany. Pet. App. A9; J.A. A278. RFE/RL's relationship with nearly all of the employees at its Munich facility was governed by its collective bargaining agreement with the German unions that represented the employees. Both petitioners here are American citizens who were employed by RFE/RL in Munich and were covered by the terms of the collective bargaining agreement.

Collective bargaining agreements in Germany are governed by the Collective Agreements Act, *reprinted at* J.A. A126-A130. That act provides that "[a] collective agreement shall govern the rights and obligations of the parties thereto and contain *rules of law*, which may regulate the purpose, commencement and termination of employment relationships * * *." *Id.* ¶ 1 (emphasis added). The act repeatedly refers to the provisions of the collective bargaining agreement as "rules of law." *See, e.g., id.* ¶ 3(2) ("the rules of law contained in a collective bargaining agreement * * * shall apply to all establishments of employers who are bound by the collective agreement"); *id.* ¶ 4(5) ("On the expiry of a collective bargaining agreement the rules of law it contains shall continue to apply until they are replaced with another arrangement"). Uncontroverted expert testimony in the record establishes that "[i]n Germany, * * * according to the act on collective agreements, all collective agreements contain provisions which are to be treated and regarded as legal provisions. In other words, they are equated to the statutory provisions. There is no difference between a statutory provision and whatever has been inserted into the collective agreement." J.A. A88-A89.

At the time RFE/RL entered into the applicable version of the collective bargaining agreement in 1982, the Age Discrimination in Employment Act ("ADEA") did

not apply to the overseas actions of United States employers. Pet. App. A2 ("In 1982, the Age Discrimination in Employment Act had no extraterritorial reach"). In keeping with widespread practice in Germany and the preferences of German labor unions, (Pet. App. A2, A11; J.A. A103-A105), one of the terms of the agreement between RFE/RL and the unions representing its employees required employees to retire at the age of 65. J.A. A474. As the court of appeals observed, when RFE/RL agreed to this provision in 1982, "this portion of the RFE/RL collective bargaining agreement was entirely lawful." Pet. App. A2. (citing *Ralis* v. *RFE/RL, Inc.*, 770 F.2d 1121, 1124 (D.C. Cir. 1985)). *See also Lopez* v. *Pan Am World Services, Inc.*, 813 F.2d 1118, 1119 (11th Cir. 1987) (citing decisions from six circuits holding that, prior to its amendment in 1984, the ADEA did not apply extraterritorially).

In 1984, Congress amended the ADEA so that its protections extended to American citizens working for American corporations overseas. *See* 29 U.S.C. § 630(f) (the term "employee" in the ADEA "includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country") and 29 U.S.C. § 623(h)(2) ("[T]he prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer"). At that time, the ADEA permitted employers to enforce mandatory retirement beginning at age 70. *See* Pet. App. A3 n.2.

RFE/RL initially believed that it could comply with the ADEA by permitting its American employees to work until age 70 if they so desired. Pet. App. A3; J.A. A364-A365. In pursuit of this policy, the company sought the acquiescence of the "Works Council," a body recognized under German law and elected by union and nonunion employees to ensure that employers adhere to all provisions of collective bargaining agreements. Pet. App. A3;

J.A. A301 (expert testimony that "[t]he Works Council law explicitly provides that one of the main tasks of the Works Council is to control whether the collective agreements in force are applied"). Although the Works Council initially determined not to oppose the company's proposal to enter into individual "continuing employment agreements" permitting twelve American employees to work to age 70, the union later determined that the Works Council should oppose the individual agreements, relying in part on its view that "application of provisions different from those agreed upon in the union contract violates existing law," J.A. A135, and that the "attempt to change the Union Contract * * * is illegal." *Id.* at A136. *See also id.* at A134. In response, the Works Council declined to consent to RFE/RL's subsequent efforts to offer employment until age 70 for U.S. citizens who desired to continue working. *See, e.g., id.* at A392 (objecting to continued employment of petitioner DeLon).

RFE/RL continued to employ those whose retirements were at issue, including petitioner DeLon, while it appealed the adverse determinations of the Works Council in the Munich Labor Court. *Id.* at A394. In four cases concerning employees covered by the collective bargaining agreement, however, the Labor Court rejected RFE/RL's efforts. In the case of petitioner DeLon, for example, the court observed that "continuing to employ Mr. DeLon beyond the age of 65 would run contrary to the legal norms of the covering wage contract, and thus also of the law concerning the wage contract as well as the Works Council Act * * *." *Id.* at A160. After the Labor Court's decisions, the Works Council notified RFE/RL that it would object to all future requests to continue the employment of American employees beyond age 65. *Id.* at A401. RFE/RL's efforts to secure modification of the collective bargaining agreement also failed. *See, e.g., id.* at A232-A234, A454-A465.

As the president of RFE/RL explained at the time, the company was thus faced with "an intolerable dilemma" in which the ADEA appeared to secure the right of employment beyond the age of 65 and the German Labor Court decisions required that employees retire at that age. *Id.* at A415. Congress, however, had anticipated the possibility of such a dilemma when it extended the reach of the ADEA overseas by providing that it is not unlawful in the case of an employee in a workplace in a foreign country for an employer to take actions otherwise prohibited by the ADEA where compliance with the ADEA "would cause such employer * * * to violate the laws of the country in which such workplace is located." 29 U.S.C. § 623(f)(1). Because it was compelled by German law to abide by the collective bargaining agreement's provision for mandatory retirement at age 65, RFE/RL ultimately implemented that policy. Pursuant to that policy, the company terminated petitioner DeLon in 1987 and petitioner Mahoney in 1988.

Before filing suit in the United States, petitioner DeLon attempted to enforce his individual employment contract in the German courts. After an initial decision in DeLon's favor, a German appeals court ruled that the employment relationship ended when DeLon reached the age of 65. If found that "the employment relationship" between DeLon and RFE/RL "is subject to German labour law," and was "accordingly terminated at the end of the month in which the Plaintiff reached the age of 65 * * *." J.A. A442. *See also id.* at A445 ("[i]f the works council does not grant its consent to a measure, and if that consent is not substituted by the Labour Court, the employer may not implement the measure * * *. If the employer nevertheless does so, he is in breach of his obligations under the works constitution law"). In reaching its decision, the court also noted that "[t]here is no indication that [RFE/RL] could have prevented the condition from

taking effect by appealing the Labour Court's decision" against it. *Id.* at A451.

In response to complaints filed by some of the individuals who were discharged in accordance with the requirements of German law, the EEOC investigated the matter and filed an action against RFE/RL in the United States District Court for the District of Columbia. After conducting extensive discovery, the EEOC moved for dismissal of the action. The court granted the motion over the objections of petitioner DeLon, noting that "[i]t is neither surprising nor unusual that the EEOC concluded it was unlikely to prevail on such a difficult question only after months of discovery and research * * *." *See EEOC* v. *RFE/RL, Inc.*, 1990 WL 154321, at *1 (D.D.C. Sept. 24, 1990). Petitioners then filed this action alleging that their dismissals at age 65 violated the ADEA.

On cross-motions for summary judgment, the district court—recognizing that "there appears to be no authority directly on point," Pet. App. A12—rejected RFE/RL's reliance on the foreign laws defense of 29 U.S.C. § 623 (f)(1) and issued a liability determination in petitioners' favor.[2] The court of appeals reversed.[3] It found that this Court's decision in *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) "stands firmly against the district court's determination." Pet. App. A5. In that case, this Court held that a rail carrier's exemption "from all other law," 49 U.S.C.

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[2] The question of damages was tried to a jury. After the jury determination that petitioners were entitled to damages, the district court entered a series of orders concerning back pay, reinstatement, and damages. *See* J.A. A18-A31. While the appeal was pending before the D.C. Circuit, petitioner Mahoney entered into a settlement with respondent concerning reinstatement and front pay. J.A. A36-A37.

[3] Petitioners inexplicably cite Judge Henderson as the author of the court of appeals' opinion. Pet. 4. The court's unanimous opinion was in fact authored by Judge Randolph. Pet. App. A2.

§ 11341(a), included a "carrier's legal obligations under a collective-bargaining agreement." 499 U.S. at 127. The court of appeals below also held that including the collective bargaining agreement and the court decisions enforcing it within the boundaries of the foreign laws defense to the ADEA "agrees with § 623(f)(1)'s evident purpose —to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates." Pet. App. A7. As the court of appeals observed, "[i]f RFE/RL had not complied with the collective bargaining agreement in this case, if it had retained plaintiffs despite the mandatory retirement provision, the company would have violated the German laws standing behind such contracts, as well as the decisions of the Munich Labor Court." *Id.* at A6. The court accordingly held that section 623(f)(1) "relieved RFE/RL of liability for terminating plaintiffs." *Id.* at A8. The court denied petitioners' petition for rehearing and suggestion for rehearing in banc without recorded dissent. *Id.* at A17, A18.

REASONS FOR DENYING THE WRIT

As petitioners recognize, Pet. A4, A5, the court of appeals decided a question of first impression concerning a statute that has been in effect for more than ten years. This isolated decision is not in conflict with the decisions of other circuits; indeed, no other circuit has considered the scope of the foreign laws defense to liability under the ADEA. In all events, the court below properly interpreted the defense in accordance with its language and purpose. This case does not merit the exercise of this Court's certiorari jurisdiction, and the petition should be denied.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE FIRST COURT OF APPEALS DECISION ON THE SCOPE OF THE DECADE-OLD FOREIGN LAWS DEFENSE TO THE ADEA

Both the extension of the ADEA to citizens employed overseas by American employers and the accompanying foreign laws defense to liability were adopted and became effective in 1984. Although the foreign laws defense has existed for more than a decade, the decisions below are the first decisions interpreting its scope. Indeed, both the district court and the petitioners have recognized that the scope of the foreign laws defense is a question of first impression. *See* Pet. App. A12 ("there appears to be no authority directly on point"); Pet. 4 (interpretation of ADEA's foreign laws defense is a "question of first impression").

As petitioners note, moreover, in response to this Court's decision in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), Congress in section 109 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), added nearly identical provisions to both Title VII and the Americans with Disabilities Act. *See* 42 U.S.C. § 2000e-1(b); 42 U.S.C. § 12112(c). Those provisions have been in effect for nearly four years, yet no court has been called on to interpret the scope of the foreign laws defense to those statutes. *See* Appellees' Brief in the D.C. Circuit at 23 ("No judicial decisions have as yet been reported interpreting the extraterritorial provision of the 1991 Civil Rights Act").

From all that appears, therefore, the question at issue in this case—the scope of the foreign laws defense—has arisen just once in more than a decade of experience. The "dearth of case law" recognized by petitioners, *id.*, is particularly significant in light of the fact that literally thousands of employment discrimination actions have been filed in the last ten years. If this were truly an issue

of grave importance, as petitioners contend, one would expect to find more than one case requiring the courts to interpret the relevant statutes. Unless and until the issue develops into a substantial question considered by other courts of appeals reaching conflicting conclusions, there is no reason for this Court's intervention. In short, this case presents the Court with neither a conflict among the lower courts nor a significant question of federal law that warrants the exercise of this Court's jurisdiction.

On the contrary, in addition to the fact that the issue has not been widely considered, there are other compelling reasons for this Court to stay its hand. First, resolution of this matter would require the Court to determine the scope and meaning of German law. Although the courts below were nominally interpreting a provision of the United States Code, that provision in turn makes reference to the requirements of "the laws of the country in which [the] workplace is located." 29 U.S.C. § 623(f)(1). The question before the lower courts, therefore, was whether the compulsion to terminate petitioners' employment was the result of the "law" of Germany. There is no need for this Court to resolve the narrow question of whether the compulsions at issue in this case were, by German standards, the equivalent of law. A resolution of that question will have no widespread application; at most, the Court would be deciding whether one aspect of one country's system of collective bargaining and enforcement constituted law in that country. Even if additional cases should eventually arise under the foreign laws defense, there is no reason to suspect on the basis of one decision that resolution of the particular question presented here would provide guidance in any future cases considering the defense in the context of entirely different legal regimes.

Second, because the law of Germany has changed since the events at issue in this case, even the narrow issue about the content of German law that was decided below

is of no continuing significance. As petitioners explained in the court of appeals, a new statute in Germany "invalidates mandatory retirement agreements unless signed or confirmed by the employee within three years of retirement age," with the result that "mandatory retirement can now no longer be enforced under the union contract." Appellees' Brief in the D.C. Circuit at 32 (citing S. Simitis, *Denationalizing Labour Law: The Case of Age Discrimination*, 15 Comp. Lab. L.J. 321, 332 (1994)). In addition to demonstrating the absence of any ongoing problem concerning application of the ADEA to American companies operating in Germany, the new statute also severely undermines petitioners' assertion here that the mandatory retirement provision of RFE/RL's collective bargaining agreement "may be forever insulated from the ADEA." Pet. 5.

Third, this case is a particularly poor vehicle for considering the scope of the foreign laws defense, for petitioners' cause of action rests on an illegitimate retroactive application of the 1984 amendments to the ADEA—which first imposed liability for the actions of American employers overseas. There is no dispute that RFE/RL's 1982 agreement requiring employees to retire at age 65 was fully lawful under American law at the time RFE/RL entered into the agreement. *See supra* at 2-3. Nor is there any doubt that RFE/RL terminated the petitioners under the compulsion of orders from the German courts to abide by the terms of the 1982 agreement. Pet. App. A6. *See also* Pet. 2 ("terminations occurred pursuant to a collective bargaining agreement * * * which mandated termination of employment at age 65"). Application of the 1984 ADEA amendments to condemn RFE/RL's 1982 labor agreement, therefore, would plainly constitute retroactive application of the 1984 amendments. As the Court explained in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), there is a strong presumption against retroactive application of statutes, particularly where the new provisions would "affect[] con-

tractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 1500. Where, as here, there is no clear evidence that Congress intended a statute to apply retroactively, it may not be interpreted to apply to events before its enactment. *Id.* at 1505. *See also Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995). Yet that is precisely what petitioners seek in their effort to use the 1984 ADEA amendments to impose liability on RFE/RL for action compelled by its 1982 agreement. Even if the issue were ripe for this Court's consideration, that consideration should await a case in which liability is otherwise appropriate.

II. THE DECISION BELOW WAS CORRECT

Making little effort to identify the existence of special considerations that would make this case appropriate for the exercise of this Court's certiorari jurisdiction, petitioners' primary submission is that the court of appeals erred in interpreting the ADEA's foreign laws defense. This Court, of course, does not sit as a court of error. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 193 (7th ed. 1993) (citing authorities). In any event, the decision below was plainly correct.

Although petitioners accuse the court of appeals of providing "too quick and easy an answer to the question of what Congress meant when it enacted the language 'to violate the laws of the country,' " Pet. at 7, petitioners have made *no* effort to assign any positive meaning to the statutory language. Instead, petitioners' "analysis" consists of a paragraph invoking general maxims of statutory construction. *See id.* at 7-8. As this Court has repeatedly noted, however, statutory construction begins not by application of default maxims but with the text of the statute itself. *See, e.g., Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct.

1439, 1446 (1994) (statutory language is "starting point in every case involving construction of a statute") (internal quotation marks and citation omitted); *Negonsott* v. *Samuels*, 113 S. Ct. 1119, 1122-23 (1993). Where Congress has not provided a particular definition, the Court "construe[s] a statutory term in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer*, 114 S. Ct. 996, 1001 (1994). *See also Asgrow Seed Co.* v. *Winterboer*, 115 S. Ct. 788, 793 (1995). Application of these basic principles of statutory construction demonstrates the propriety of the decision below.

The ordinary and natural meaning of the word "law" —which is the only point of contention here—is well established. As the Ninth Circuit has observed, "[t]he 'plain meaning' of the word 'law,' as commonly used and generally understood, is fairly broad in scope." *United States* v. *594,464 Pounds of Salmon*, 871 F.2d 824, 826 (9th Cir. 1989). The court in *594,464 Pounds of Salmon* relied on the "generic" definition of law in *Black's Law Dictionary*, which defines the term as "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force * * *. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law." *Id.* Other dictionaries concur in *Black's* broad definition of the word "law." *See, e.g.*, 1 *The New Shorter Oxford English Dictionary* 1544 (1993) ("The body of rules, whether formally enacted or customary, which a particular State or community recognizes as governing the actions of its subjects or members and which it may enforce by imposing penalties"); *Webster's Ninth New Collegiate Dictionary* 678 (1989) (including among the definitions of "law" "a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority").

This common and ordinary definition of law is clearly broad enough to encompass the legal compulsion faced by RFE/RL when it terminated petitioners pursuant to

the terms of its labor agreement and the orders of German courts enforcing that agreement. Following established legal channels in Germany, RFE/RL sought the acquiescence of the Works Council to employment of U.S. citizens until age 70. Unable to secure that consent because of the belief of the labor unions that it would be illegal, the company appealed the Works Council's action to the German Labor Court. That court concurred in the determination that the proposed action would be illegal. It held in the case of Petitioner DeLon, for example, that "continuing to employ Mr. DeLon beyond the age of 65 would run contrary to the legal norms of the covering wage contract, and thus also of the law concerning the wage contract as well as the Works Council Act * * *." J.A. 160. RFE/RL was compelled to terminate DeLon or suffer the legal consequences of failure to do so. Because any ADEA violation was therefore plainly caused by the "law of the country" at issue, the foreign laws defense absolves RFE/RL of liability.

Although petitioners do not offer the Court any preferred definition of the statutory term at issue, they imply that "law" consists only of the positive enactments of the legislative body as opposed to the common law. Pet. 8 (suggesting that "laws of the country" means "laws of the sovereign"). This implication ignores the uncontroverted evidence that the terms of collective bargaining agreements in Germany are functionally equivalent to statutes. *See supra* at 2. Even if that evidence is not considered, however, the implication fails of its own terms, for it has long been understood that the non-statutory rules applied by courts constitute "law," namely, the "common law." *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("At least since *Erie R.* v. *Tompkins*, 304 U.S. 64 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations"). Had Congress intended to limit the availability of the foreign laws defense in the way petitioners would

like, it could easily have enacted a foreign *statutes* defense to ADEA liability. But it did not do so, preferring instead to insulate employers from liability for any actions compelled by foreign law generally.

As this Court observed in *Norfolk & Western*, such a general reference to "law" "does not admit of the distinction * * * between positive enactments and common-law rules of liability." 499 U.S. at 128. Rather, relying on venerable precedents,[4] the Court held that the term is "broad enough to include laws that govern obligations imposed by contract," *id.* at 129, and specifically held that the exemption from other laws at issue there includes an exemption from "the obligations imposed by the terms of a collective-bargaining agreement." *Id.* at 128. As the court of appeals held, that determination disposes of petitioners' submissions in this case. Abiding by the terms of the ADEA would have caused RFE/RL to violate its collective bargaining agreement, the law supporting enforcement of such agreements generally, and the orders of the Munich Labor Court considering this very dispute.

The court of appeals also recognized that application of the foreign laws defense in these circumstances is consistent not only with the language of the statute but also with the purposes for which it was enacted. *See New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 115 S. Ct. 1671 (1995) (statutory construction begins with text of the provision and question and then, if necessary, considers purpose and structure of the act). Congress created the foreign laws defense specifically to relieve American companies operating overseas from the dilemma of conflicting legal requirements. *See, e.g.*, S. Rep. No. 98-467, 98th Cong., 2d Sess.

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[4] *See* 499 U.S. at 129-130, citing *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 429 (1934) ("The obligation of a contract is 'the law which binds the parties to perform their agreement.'" (quoting *Sturges* v. *Crowninshield*, 17 Wheat. 122, 197 (1819))).

27-28 (1984). Petitioners' submission notwithstanding, there is no question that RFE/RL found itself in just such a dilemma, and that the construction of the foreign laws defense adopted by the court of appeals serves its "evident purpose—to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed by the United States and the other imposed by the country in which the company operates." Pet. App. A7.[5]

Finally, there is no merit to petitioners' suggestion that the decision below invalidated the EEOC's guidelines on the foreign laws defense to federal civil rights statutes. The EEOC's *Policy Guide on ADEA's Foreign Laws Defense*, 8 Fair Empl. Prac. Man. (BNA) 405:6787 (Dec. 5, 1989), certainly does not adopt the limitations urged by petitioners. It merely observes the "difficulty in formulating * * * a comprehensive definition" of the word "law," citing the decision in *Miller* v. *Dunn*, 72 Cal. 462, 14 P. 27 (1887), to the effect that "there is no word

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[5] A court might face a different question in the hypothetical case in which an overseas employer entered into a voluntary agreement in violation of the ADEA *after* the extension of the ADEA, for, depending on the facts and circumstances of the case, it could plausibly be argued that the employer's voluntary action—and not the "law of the country"—caused the ADEA violation. *Cf. Hartford Fire Ins. Co.* v. *California*, 113 S. Ct. 2891, 2911 (1993) (no conflict with foreign law where "the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States"). Here, however, as the court of appeals observed, "[t]here is not * * * any suggestion that RFE/RL agreed to the mandatory retirement provision in order to evade" the ADEA, Pet. App. A8, because it entered into the agreement in 1982 and was legally bound by the collective bargaining agreement *before* the 1984 extension of the ADEA. Because it is likely that very few employers find themselves bound in 1995 by pre-1984 agreements, resolution of this matter will not necessarily dispose of any future cases that may arise. The uncommon circumstances of this case are an additional reason why it does not merit this Court's review.

in the language which, in its popular and technical application, takes a wider or more diversified signification." 8 Fair Empl. Prac. Man. at 405:6788. The Commission also observed that "a corporation/business's rules, regulations or policies of employment"—which can unilaterally be changed by the employer—do not constitute law for purposes of the foreign laws defense. *Id.* That guidance is plainly not implicated by the decision in this case. As petitioners note, however, the Commission did discuss the district court's holding below in its separate guidance on the foreign laws defense to Title VII and the Americans with Disabilities Act. *Enforcement Guidance on Application of Title VII and ADA to Conduct Overseas and to Foreign Employers in the United States,* 8 Fair Empl. Prac. Man. (BNA) 405:6663 (Oct. 20, 1993). That guidance, which the Commission expressly stated did not control ADEA cases, *see id.* at n.1, merely described the district court's holding, but did not plainly endorse the approach followed by the district court. This is precisely the sort of EEOC "guidance" to which this Court has declined to defer. *See, e.g., EEOC* v. *Arabian American Oil Co.,* 499 U.S. at 257-258.[6] Petitioners' claims that the decision below will impair the EEOC's enforcement efforts, Pet. 5, rings particularly hollow in light of the EEOC's determination not to pursue *this very claim. See supra* at 6.

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[6] Petitioners have conceded that the EEOC guidelines "are accorded less weight than administrative regulations." Appellees' Brief in the D.C. Circuit at 23. The level of deference to the EEOC depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC* v. *Arabian American Oil Co.,* 499 U.S. at 257 (internal quotation marks and citations omitted). Under these standards, the EEOC's simple description of the district court's unpersuasive (and later reversed) holding is hardly entitled to deference.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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